AUG 4 1982

Nos. 81-185, 81-746 and 81-1172, 81-1255 and 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHRIS SIMOPOULOS, M.D., FACOG,
Defendant-Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,
State-Appellee.

CITY OF AKRON, et al.,
Defendants-Petitioners,

—v.—

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Plaintiffs-Respondents.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Plaintiffs-Petitioners,

—v.—

CITY OF AKRON, et al.,
Defendants-Respondents.

(Caption continued on inside front cover)

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA AND ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF CERTAIN LAW PROFESSORS

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Plaintiffs-Petitioners,

—v.—

JOHN L. ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, et al.,

Defendants-Respondents.

JOHN L. ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, et al.,

Defendants-Petitioners,

—v.—

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Nos. 81-185, 81-746 and 81-1172,
81-1255 and 81-1623

In the
Supreme Court of the United States
October Term, 1982

Chris Simopoulos, M.D., FACOG,
Defendant-Appellant
v.
Commonwealth of Virginia,
State-Appellee

City of Akron, et al.,
Defendants-Petitioners,
v.
Akron Center for Reproductive Health,
Inc., et. al.,
Plaintiffs-Respondents

Akron Center for Reproductive Health,
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Plaintiffs-Petitioners
v.
City of Akron, et al.,
Defendants-Respondents

Planned Parenthood Association of
Kansas City, Missouri, Inc., et. al.,
Plaintiffs-Petitioners
v.
John L. Ashcroft, Attorney General
of the State of Missouri, et al.,
Defendants-Respondents

John L. Ashcroft, Attorney General of
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Plaintiffs-Respondents

On Appeal from the Supreme Court of Virginia
and on Certiorari to the United States Court
of Appeals for the Sixth Circuit and the
United States Court of Appeals for the
Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF CERTAIN LAW PROFESSORS

MOTION OF CERTAIN LAW PROFESSORS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The above listed 85 law professors respectfully move the Court for leave to file the accompanying brief amici curiae, in support of defendant below in Simopoulos v. Virginia (No. 81-185); plaintiffs below on all issues in City of Akron v. Akron Center for Reproductive Health, Inc. (Nos. 81-746 & 81-1172); and plaintiffs below on all issues in Planned Parenthood of Kansas City, Missouri, Inc. v. Ashcroft (Nos. 81-1255 & 81-1623), with the exception of the question of statutory construction regarding minors' consent, on which we take no position.

Amici teach in American law schools. We submit this brief to

share with the Court our support for the principles of constitutional law embodied in this Court's opinion in Roe v. Wade, 410 U.S. 113 (1973), and in the Court's subsequent applications of Roe. We believe that, as the ultimate guardian of the precious and delicate constitutional right of privacy as well as the final source of coherent constitutional doctrine, this Court must recognize the continuing validity of Roe. We, therefore, urge this Court to review with the strict judicial scrutiny used in Roe all enactments at bar regulating abortion procedures for adult women and to consider the regulations of abortions for minors against the special standard

of review articulated by this Court in recognition of the unique status of children under the law.

We have sought the consent of the parties to file a brief amici curiae. Counsel for all parties in all three cases have consented, with the exception of counsel for the Commonwealth of Virginia in Simopoulos v. Virginia (No. 81-185).

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On Appeal from the Supreme Court of Virginia
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Eighth Circuit

BRIEF AMICI CURIAE OF CERTAIN LAW PROFESSORS

This brief is submitted by the 85 listed individual amici curiae conditionally upon the granting of the attached motion for leave to file.

INTEREST OF THE AMICI

The interest of the amici is set forth in the attached motion for leave to file.

SUMMARY OF ARGUMENT

The constitutional right of privacy, a fundamental liberty shielded by the due process clause of the Fourteenth Amendment and so recognized by this Court in Roe v. Wade, 410 U.S. 113 (1973), presumptively relegates to the individual the intensely personal choice whether or not to terminate a pregnancy. This Court has explicitly determined on many occasions that this

prima facie right encompasses freedom from direct governmental interference with the means to effectuate the abortion choice and that access to abortion is essential to the constitutionally protected right of decision.

When examining enactments regulating abortions sought by adult women, this Court has consistently used a two-step analysis: It has first decided whether the law directly interferes with or imposes any burden at all on the woman's freedom to choose abortion or to effectuate that choice. If the law does so, this Court has then applied strict judicial scrutiny, requiring the law to be not only justified by a compelling state interest but also narrowly tailored to further that

goal. In the abortion context, this Court has identified just two state interests that will reach the "compelling point" -- preserving potential life after fetal viability and protecting maternal health after approximately the end of the first trimester.

This Court's precedents as well as the precious and delicate nature of the fundamental privacy right dictate that the enactments at bar regulating access to abortions for adult women be tested within the analytical framework described above. The balancing test or the sliding scale used as a standard of review by some lower courts would threaten all fundamental constitutional rights and would continually mire the courts in circular and

standardless evaluations of the "burdensomeness" of every abortion regulation.

Because of the unique status of children under the law, this Court has required regulations of abortions sought by minors to be justified by significant state interests not present in the case of an adult, such as the interest in parental involvement. This Court's precedents have recognized, however, that to withstand constitutional attack these abortion regulations must allow mature minors to make their own decisions and must exempt from parental involvement minors whose best interests so require.

ARGUMENT

I.

The fundamental constitutional right of privacy, as elaborated by this Court in Roe v. Wade, protects a woman's abortion decision and her access to the means to effectuate that decision from the direct governmental interference imposed by the regulations now before this Court.

In Roe v. Wade, 410 U.S. 113 (1973), this Court held unconstitutional a Texas statute criminalizing all but life-saving abortions because the "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. In so holding, this Court did not decide that abortion is a desirable response to an unhealthful or unwanted pregnancy; instead, it recognized simply that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state

action" presumptively relegate such intensely personal and sensitive matters of conscience to individual choice, not government control. Id.; see Tribe, The Supreme Court, 1972 Term--Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973).

The prima facie constitutional right recognized in Roe belongs to the pregnant woman, Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977), although this Court has made plain the indispensable role of her physician's best medical judgment in considering all factors relating to her pregnancy, in assisting her in the decisionmaking process, and in implementing her decision, should she choose abortion. See Roe, 410 U.S. at 153, 163; Doe v. Bolton, 410 U.S.

179, 192, 196-97 (1973); Connecticut v. Menillo, 423 U.S. 9 (1975); Colautti v. Franklin, 439 U.S. 379, 387 (1979). Abortion is, after all, a medical procedure, Roe, 410 U.S. at 166, and constraints on a physician's exercise of his best medical judgment necessarily interfere with "the woman's freedom to make a constitutionally protected decision," Whalen, 429 U.S. at 605 n.33.

The zone of privacy shielded by the Fourteenth Amendment, under Roe, encompasses not only "the interest in independence in making certain kinds of important decisions," Whalen, 429 U.S. at 599-600, but also the complementary and inseparable interest in being permitted to effectuate those decisions. See Paul v. Davis, 424 U.S.

693, 713 (1976) (emphasis added) ("limitations on States' power to substantively regulate conduct" in privacy matters). In other words, the interest that Roe found constitutionally secured is not just a theoretical interest in abstract decisionmaking on the subject of abortion; rather, this Fourteenth Amendment liberty necessarily includes protection from unjustified governmental interference with the means of effectuating a woman's abortion choice. Regarding the first trimester of pregnancy, for example, this Court held in Roe that "[i]f [the abortion] decision is reached, the judgment may be effectuated by an abortion free of interference by the State," 410 U.S. at 163 (emphasis added), and that "the abortion decision and its effectuation

must be left to the medical judgment of the pregnant woman's attending physician," id. at 164 (emphasis added).

This principle was forcefully reaffirmed in Carey v. Population Services International, 431 U.S. 678 (1977), where this Court found its privacy precedents to "establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." Id. at 688. This Court reasoned that "access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the under-

lying foundation of the [holding] in ... Roe v. Wade." Id. at 688-89. Thus, New York's restrictions on access to contraceptives, including a requirement that only licensed pharmacists distribute contraceptives, were invalid because they unjustifiably burdened the right of individuals to use such items. Id. at 686-90.

This Court's repeated reliance on the reasoning used in Roe to strike down restrictions falling far short of complete prohibitions of abortions clearly demonstrates the centrality of access to the means of effectuating the abortion decision. For example, Roe's reasoning was invoked in its companion case, Doe v. Bolton, to overturn the procedural provisions of Georgia's "modern" abortion legislation, includ-

ing special hospitalization, accreditation, committee-approval, and two-doctor concurrence requirements. These requirements did not bar abortions altogether, and abortions remained available so long as physicians complied (under threat of criminal penalties) with these regulations. Nonetheless, this Court concluded that Georgia had, without sufficient justification, limited a physician's exercise of his best medical judgment--and thus derivatively his patient's right of privacy. 410 U.S. at 192-200. Three years later, Missouri's spousal consent requirement and its ban on saline amniocentesis (a then popular method of second-trimester abortion) fell when subjected to the analysis dictated by Roe and Doe. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

Both requirements, provisions accompanied by criminal sanctions for noncompliance, blocked a woman's access without, however, completely prohibiting abortion.

The constitutional constraints that prevent government from interfering with the abortion choice and its effectuation do not require government actively to assist women to obtain abortions, even women unable to afford to pay for such treatment themselves. Harris v. McRae, 448 U.S. 297 (1980) (federal government); Williams v. Zbaraz, 448 U.S. 358 (1980) (states). Taking care to emphasize the continuing validity of the Roe doctrine, this Court has determined that government inaction--such as the failure to fund abortions for the indigent--simply does not impinge on the protected right to obtain an abortion, free from official

interference. McRae, 448 U.S. at 314, 318.[1/]

The cases at bar raise a number of questions virtually identical to issues that this Court has resolved definitively in the past. The question of abortion access--or protection from direct interference with the means of effectuating the abortion decision--is squarely presented by the requirements that all abortions after the first trimester be performed in hospitals;[2/]

1/ A well-defined line separates active or direct interference with the right recognized in Roe and governmental failure to provide abortions for all. See McRae; Maher v. Roe, 432 U.S. 464 (1977). See also Colautti v. Franklin, 439 U.S. 379, 386 n.7 (1979).

2/ All three cases now before this Court present challenges to hos-

(Footnote continued on following page)

that the attending physician personally inform the patient of facts relating to her pregnancy, the abortion procedure, fetal characteristics, agencies available to assist her, appropriate postoperative care, and the risks of the abortion technique to be used;[3/] that the abortion patient wait

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Footnote continued

pitalization requirements for all abortions performed after the first trimester.

3/ Plaintiffs below in Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio 1979), aff'd in part, rev'd in part, 651 F.2d 1198 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-746 & 81-1172), challenge provisions of an Akron, Ohio city ordinance containing the requirements described in text accompanying notes 3-4.

twenty-four hours between giving her informed consent and the performance of an abortion;[4/] that a second physician attend the abortion of a viable fetus;[5/] and that pathology reports by qualified pathologists be prepared following all abortions.[6/] Like the two-doctor concurrence and hospital-accreditation requirements invalidated

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4/ See note 3 supra.

5/ Plaintiffs below in Planned Parenthood Ass'n. of Kansas City, Mo., Inc. v. Ashcroft, 483 F.Supp. 679 (W.D. Mo. 1980), aff'd in part, rev'd in part, 655 F.2d 848 (8th Cir.), on remand, 664 F.2d 687 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-1255 & 81-1623), challenge provisions of a Missouri statute containing the requirements described in text accompanying notes 5-6.

6/ See note 5 supra.

in Doe and the spousal consent rule and saline amniocentesis ban overturned in Danforth, these restrictions do not entirely prohibit obtaining an abortion. Yet all of the limitations now before this Court, according to the records, make effectuating the abortion decision of adult women more onerous, more costly, more time-consuming, more difficult, and--sometimes--more hazardous.[7/]

7/ Courts have determined that mandatory waiting periods, like those imposed by the Akron ordinance, see note 4 and accompanying text supra, increase the health risks to the abortion patient by delaying the procedure as her pregnancy advances. See, e.g., Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981) (48-hour waiting period), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-1255

(Footnote continued on following page)

None of these enactments could even arguably be characterized as a mere failure to provide active governmental assistance, to be reviewed according to the analysis in the abortion-funding cases. See, e.g., Harris v. McRae, 448 U.S. 297 (1980). Instead, these enactments are state-created obstacles to abortion imposed through affirmative regulation of private conduct and policed with criminal

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Footnote continued

& 81-1623); Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1014 (1st Cir. 1981) (24-hour waiting period); Charles v. Carey, 627 F.2d 772, 785 (7th Cir. 1980) (24-hour waiting period). Hospitalization requirements, see note 2 supra, may also increase the health risks of abortion. See Ashcroft, 655 F.2d at 856-57.

penalties for noncompliance. They treat abortion differently from any other medical service, overriding standard medical practice and individual professional judgment. They interfere directly with the prima facie right of privacy of adult women elaborated in Roe, and they call for review against the standard used by this Court in Roe and in all subsequent abortion cases involving direct interference with the constitutional right of privacy of adult women: strict judicial scrutiny.8/

8/ This Court's validation in Danforth of Missouri's written consent and recordkeeping requirements can easily be reconciled with the above con-

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clusions. The written consent requirement imposes no burden on the privacy right but simply verifies that the abortion decision is made by the individual to whom the protected privacy right belongs, the pregnant woman. The recordkeeping requirement, albeit for slightly different reasons, imposes "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." Danforth, 428 U.S. at 81. The Court's treatment of both these issues is elaborated further in part II B infra.

II.

This Court must scrutinize the abortion regulations now before it against the single standard, strict judicial scrutiny, consistently applied to all regulations directly imposing any burden on the adult woman's privacy right; a more relaxed test allowing ad hoc evaluations of the degree of the burden inflicted by abortion regulations would undermine a fundamental constitutional right, conflict with this Court's precedents, and create a judicially unmanageable standard for all fundamental-rights cases.

A.

Under Roe v. Wade, the abortion regulations now before this Court must be narrowly drawn to advance one of two possible compelling state interests: maternal health (compelling only after approximately the end of the first trimester) and potential life (compelling only after fetal viability).

This Court carefully explained that the liberty recognized in Roe v. Wade, although neither absolute nor

unqualified, is a "fundamental right." 410 U.S. at 153-55. To withstand the strict judicial scrutiny evoked by such protected interests, any governmental restriction interfering with the right of an adult woman to terminate a pregnancy "may be justified only by a 'compelling state interest'" and "must be narrowly drawn to express only the legitimate state interests at stake." Id. at 155. See Carey v. Population Services International, 431 U.S. 678, 686 (1977). The abortion regulations at bar must be tested against this standard.

In Roe and its successors, this Court identified only two state interests that become sufficiently compel-

ling at particular points in pregnancy to meet this test. First, a state's interest in protecting potential life becomes sufficiently compelling to justify abortion restrictions narrowly designed to further that goal only after viability, the point of fetal capacity for meaningful extrauterine survival. Roe, 410 U.S. at 163.[9/]

Second, the interest a state may assert in protecting maternal health matures to "the 'compelling' point" only at "approximately the end of the first trimester" of pregnancy, id. at 163, because until that time--according

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9/ See also Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 63-65 (1976); Colautti v. Franklin, 439 U.S. 379 (1979).

to the medical literature available in 1973--"mortality in abortion may be less than mortality in normal childbirth," id; see id. at 149; Connecticut v. Menillo, 423 U.S. 9, 11 (1975). Restricting abortion during the first trimester because of the purported danger of the procedure would, therefore, only subject pregnant women to the greater health hazards posed by delivery, the inevitable end of an uninterrupted pregnancy. The logic of this conclusion necessarily transcends the particular timetable developed by this Court in 1973. Thus, as abortion techniques become more sophisticated, the comparative dangers of abortion at any point in pregnancy as opposed to child-

birth will change. The post-first-trimester hospitalization requirements raised by all three cases now before this Court must be examined in this light.

After this "compelling point," the Constitution allows states to enact abortion regulations that "reasonably [relate] to the preservation and protection of maternal health." Roe, 410 U.S. at 163. The reference to "reasonableness" here not is a departure from application of the "compelling state interest" test, but instead reflects the analysis used by this Court to ascertain whether that test, with its requirement of narrowly tailored enactments, was satisfied: Abortion regu-

lations that depart from established medical practices are insupportable on health grounds because they unnecessarily constrain the physician's exercise of his best medical judgment, recognized by this Court as the strongest safeguard of maternal health. See Doe v. Bolton, 410 U.S. 179, 192, 195, 197 (1973). They may therefore increase the risks of abortion without conferring any health benefits in return. They may also force women to undergo the often greater health risks of childbirth by limiting the availability of abortions. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 77-78 (1976). Such unnecessary abortion restrictions are,

as a result, unreasonable on health grounds and thus are not narrowly drafted to advance a compelling state interest in protecting maternal health.

Because neither the interest in preserving potential life nor the interest in protecting maternal health is compelling during the first trimester of pregnancy, throughout that stage "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." Roe, 410 U.S. at 163. This Court has rejected the argument that a state has any sufficiently compelling interests to limit an adult woman's

liberty to effectuate the abortion decision during the first trimester. See id. at 162-64.

B.

This Court's precedents dictate a two-step inquiry to ascertain whether the abortion regulations at bar are unconstitutional: do the regulations impose any burden at all on the abortion decision and its effectuation and, because these regulations directly impose such burdens, do they fail to satisfy the "compelling state interest" test?

In cases involving governmental interference with an adult woman's abortion decision or with her access to the means to effectuate that decision, this Court has never wavered from applying the "compelling state interest" test employed in Roe. See Carey v. Population Services International, 431 U.S. 678, 688 (1977) (same "compel-

ling state interest" test must be applied to restrictions on abortion access as to complete prohibitions). For example, Georgia's special hospitalization and accreditation regulations, unable to withstand this Court's strict judicial scrutiny because they applied indiscriminately even to the first trimester, fell in Doe v. Bolton, 410 U.S. 179, 194-95 (1973). Similarly, a number of Missouri abortion restrictions, including a spousal consent requirement and a ban on saline amniocentesis, were declared unconstitutional because they failed to prove necessary to advance either of the two compelling state interests identified in Roe. Planned Parenthood of Central Missouri

v. Danforth, 428 U.S. 52, 69 (1976) (spousal consent law impermissibly covers even first trimester); id. at 79 (saline amniocentesis ban "fails as a reasonable regulation for the protection of maternal health").

This Court has applied a less stringent test to abortion laws only where the state has not acted affirmatively at all to impinge on a woman's right to obtain an abortion or where a regulation does not interfere--even to a minimal extent--with that right. Thus, for example, this Court has not applied the "compelling state interest" test to governmental failure to fund abortions for the indigent, inaction imposing "no restriction on access to

abortions that was not already there." Maher v. Roe, 432 U.S. 464, 474 (1977); see Harris v. McRae, 448 U.S. 297 (1980). Similarly, simple written-consent and recordkeeping requirements have not evoked this Court's strictest scrutiny because these regulations in no way interfere with a woman's ability to decide to obtain an abortion and to effectuate that decision. A simple[10/] written-consent requirement merely assures that the abortion deci-

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10/ The Court cautioned in Danforth that elaborate or detailed informed-consent requirements "might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," thus infringing the patient's right of privacy. 428 U.S. at 67 n.8.

sion has been made by the pregnant woman herself, the individual to whom the constitutional right of privacy belongs, see note 8 supra, while mandated recordkeeping of the sort considered in Danforth has "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship," Danforth, 428 U.S. at 81 (emphasis added). See Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) (absent a deprivation of constitutionally protected liberty, state need not show law necessary to compelling state interest).

This Court's precedents thus unequivocally dictate a two-step inquiry for ascertaining the constitutionality

of a challenged abortion regulation. First, a court must examine whether or not the regulation is state action imposing any burden at all on the right to obtain an abortion. The question here is not one of degree but simply whether the regulation affirmatively imposes any legally cognizable burden. If it does not, then the analytical framework developed in Roe does not govern. See Danforth; Maher; McRae. If, however, the regulation imposes any burden on the right recognized in Roe, then, as a second step, strict judicial scrutiny must be applied to determine whether that burden is undue--that is, whether it is properly justified by

a compelling state interest and sufficiently narrowly tailored to further that goal. See McRae, 448 U.S. at 314; Maher, 432 U.S. at 473-74.

Roe made plain the principles controlling during this second step of the inquiry: the lack of any compelling state interest during the first trimester of pregnancy, the compelling character of a state's interest in protecting maternal health only after the first trimester,[11/] and the compelling character of a state's interest in preserving potential life only after fetal viability. 410 U.S. at 163-64.

As noted earlier, all of the regu-

11/ But see pages 23-24 supra.

lations now before this Court interfere directly with the right recognized in Roe; according to the records, they significantly burden the abortion decision and its effectuation by making termination of a pregnancy more onerous, more costly, more time-consuming, more difficult, and--sometimes-- more hazardous.12/

Under the strict judicial scrutiny that must therefore govern, all of the measures applicable to abortions sought by adult women during the first trimester must fall because neither state interest identified in Roe is sufficiently compelling during that stage

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12/ See note 7 supra.

to support such restrictions. All of the first-trimester regulations challenged here are, consequently, "unduly burdensome." See McRae, 448 U.S. at 314, Maher, 432 U.S. at 473-74 (Roe doctrine "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"). These impermissible first-trimester regulations include the requirements that the attending physician personally inform the patient of facts relating to her pregnancy, the abortion procedure, fetal characteristics, agencies available to assist her, appropriate postoperative care, and the risks of the abortion technique

to be used;[13/] that the abortion patient wait twenty-four hours between the giving of her informed consent and the performance of an abortion;[14/] and that pathology reports by qualified pathologists be prepared after all abortions.[15/]

The measures before this Court regulating abortions after the first trimester must also be tested against the Roe standard. This Court must determine whether Missouri, Virginia and Akron, Ohio have established that

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13/ See note 3 supra.

14/ See notes 3-4 supra.

15/ See notes 5-6 supra.

their hospitalization requirements for all abortions performed after the first trimester are necessary to protect maternal health and that those requirements are drafted narrowly to achieve that legitimate goal.16/ Current medical knowledge regarding the relative safety of various abortion techniques and the comparative risks of childbirth

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16/ See note 2 supra. Because the constitutional right at stake is fundamental, the state (or city) bears the burden of satisfying the "compelling state interest" test. See, e.g., Roe, 410 U.S. at 155. See also Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion). The court in Simopoulos v. Commonwealth, 277 S.E.2d 194, 204 (Va. 1981), probable jurisdiction noted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (No. 81-185), thus incorrectly presumed the constitutionality of Virginia's mandatory hospitalization law.

and abortion must figure in this analysis, as it has in this Court's precedents. See Roe, 410 U.S. at 163; Danforth, 428 U.S. at 76-79; part II A supra. For example, the finding by the district court in Ashcroft, affirmed by the court of appeals, regarding the comparable safety of D & E procedures inside and outside hospitals must be a determinative consideration. Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 664 F.2d 687, 690 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-1255 & 81-1623).

Similarly, Missouri's law mandating the attendance of a second physi-

cian at the abortion of a viable fetus[17/] will survive the required strict scrutiny only if determined to be narrowly tailored to advance the state's interest in preserving potential life after the relevant "compelling point," fetal viability. See Colautti v. Franklin, 439 U.S. 379 (1979). The district court, affirmed by the court of appeals, found this law unconstitutionally overbroad because it covered even those abortions which maternal health considerations required to be performed by means incompatible with

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17/ See note 5 supra.

fetal survival.[18/] Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848, 865-66 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-1255 & 81-1623).

In sum, Roe and its successors dictate the controlling standard of review, strict scrutiny, that must apply to the regulations challenged here as well as the identity and scope of the two state interests that may be sufficiently compelling to support narrowly drawn abortion limitations.

18/ Under Roe, even though a state may generally go so far as to proscribe post-viability abortions, it cannot do so in cases where maternal life or health would be jeopardized. 410 U.S. at 164, 165.

C.

Only the "compelling state interest" test--applied here and in all fundamental-rights cases--promises adequate protection of fundamental constitutional rights, consistency with this Court's precedents, and elimination of the uncertainty that a variable standard of review resting on ad hoc assessment of burdens generates.

The reasons are plain why this Court will continue to adhere to the two-step inquiry dictated by its precedents, instead of resorting to a balancing test[19/] or sliding

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19/ Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1200 (N.D. Ohio 1979) (defining balancing test). See id. at 1207 (applying balancing test).

The district court in the Akron case (Nos. 81-746 & 81-1172) used a balancing test on the theory that only

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scale[20/] based upon ad hoc evaluations

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an absolute prohibition or veto of the abortion decision must be justified by a compelling state interest and narrowly drawn to further that goal. "Lesser" invasions of the privacy right require a court simply to weigh the "degree" of interference against "any valid state interest furthered by such" regulation. Id. at 1200.

The district court's erroneous conclusion about the appropriate standard of review stems from its effort to read this Court's treatment of direct interference with an adult woman's right of privacy together with the opinions in two very different areas: cases concerning the privacy rights of minors, where this Court has applied a distinct standard of review, see part III infra, and the abortion-funding cases, where the lack of any active governmental interference with the abortion decision eliminates the need for strict scrutiny, see, e.g., Harris v. McRae, 448 U.S. 297 (1980).

20/ Judge Kennedy, concurring in part and dissenting in part in the Akron

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of the degree of the burden arguably imposed by each and every abortion regulation.

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case (Nos. 81-746 & 81-1172), fashioned a sliding scale under which the intensity of the judicial scrutiny is determined by the degree of the burden an abortion regulation imposes. Unlike the district court, see note 19 supra, Judge Kennedy would not confine strict scrutiny to absolute prohibitions and vetoes of the abortion decision. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1215 (6th Cir. 1981) (Kennedy, J., concurring and dissenting). Unlike the majority of the court of appeals, however, Judge Kennedy would eschew the two-step inquiry and would decline to apply strict scrutiny to all restrictions imposing any burden on the abortion decision. Id. n.5.

The basic flaw in Judge Kennedy's analysis is the same as that in the district court opinion: an attempt to unify several clearly and explicitly distinguished lines of cases. See note 19 supra.

First, as this Court emphasized decades ago, "it is the character of the right, not of the limitation, which determines what [constitutional] standard governs the [legislative] choice." Thomas v. Collins, 323 U.S. 516, 530 (1945). That principle remains sound law today. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). Constitutional rights properly deemed fundamental, such as the right to decide to terminate a pregnancy and the right to effectuate that decision, require the vigorous protection from governmental intrusions that only strict judicial scrutiny, applied to every direct interference or burden, affords.

The right of privacy, in particular, which limits the government's power to intervene in intensely personal decisions and their effectuation, demands the most stringent standard of judicial review. A matter as sensitive as whether or not to terminate a pregnancy--fraught as it is with intractable questions about the beginning of human life--simply cannot be left to majoritarian resolution, under which any number of impediments to abortion might be reasonable if predicated upon one of several competing and ultimately unverifiable theories of human existence. This Court has thus recognized that the Fourteenth Amendment's due process clause prima facie guarantees

to the individual the power to resolve such questions. Roe v. Wade, 410 U.S. at 162 (Texas may not override the rights of the pregnant woman by adopting one theory of life); Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign...."); Tribe, The Supreme Court, 1972 Term--Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973).

This Court has carefully crafted the "compelling state interest" test

so that truly overriding governmental concerns, if advanced by narrowly drafted laws, can impinge on fundamental liberties, including the right of privacy. Under such circumstances, a deprivation of liberty is constitutionally justified, and the ultimate judgment will be that that deprivation is not "unduly burdensome." See generally Note, Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance, 57 B.U.L. Rev. 462 (1977). To suggest, as some lower courts have, that strict scrutiny controls only when the burden on the privacy right is thought, in the first

instance, to be "undue"[21/] is to turn this Court's preservation of individual constitutional rights on its head. Lowering the standard of review for

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21/ See, e.g., Leigh v. Olsen, 497 F.Supp. 1340, 1343, 1346 (D.N.D. 1980) (regulations not unduly burdening abortion decision need be only rational; statute requiring patient to be informed of alternatives to abortion bears reasonable relation to informed consent and state's preference for childbirth). But see Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980): "[T]he term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny." Other courts have adopted this well-reasoned statement of the law. E.g., Planned Parenthood Ass'n of Kansas City, Inc. v. Ashcroft, 655 F.2d 848, 855 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-1255 & 81-1623); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1204 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-746 & 81-1172).

arguably "lesser" infringements would eviscerate the protection of fundamental rights by sustaining such infringements even if overbroad or unrelated to a compelling interest.22/

Moreover, because the operative element in such analysis would be the perceived degree of the burden imposed,

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22/ For example, the district court in the Akron case sustained several first-trimester abortion regulations (including a detailed "informed-consent" requirement and a mandatory twenty-four-hour waiting period) because they furthered "valid state interests in maternal health and welfare" without cumulatively making abortion "so much more expensive" as to effect a veto of a woman's decision. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1207 (N.D. Ohio 1979), aff'd in part, rev 'd in part, 651 F.2d 1198 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-746 & 81-1172).

no unique feature of abortion litigation would confine this variable standard of review to those cases alone; all fundamental rights would be equally susceptible of such diluted protection. See Appleton, Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis, 81 Colum. L. Rev. 721, 752-53 (1981).

Apart from the precious and delicate nature of the privacy right and the resulting need for heightened judicial protection, the analytical framework that this Court has consistently followed since Roe must be retained because it is the only one capable of

coherent judicial administration. Use of a balancing test[23/] or a sliding scale[24/] in order to set a standard of review is entirely unworkable for two reasons.

First, it is circular. It purports to prescribe a standard of review that will guide the consideration of various factors but in truth it brings all those factors into play in setting the standard.[25/] Such circularity is obviously untenable and could only raise questions about the foundation and consistency of the decisions rest-

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23/ See note 19 supra.

24/ See note 20 supra.

25/ See note 21 supra.

ing on such reasoning. In contrast, the Roe analysis is entirely straightforward. And whatever may be said about the outcome-determinative quality of strict judicial scrutiny in other contexts,[26/] this Court's identification in Roe of two state interests that eventually do become compelling demonstrates that strict scrutiny in abortion cases does not "merely [announce] an inevitable result"[27/]--unconstitution-

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26/ See Gunther, The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

27/ Widmar v. Vincent, 102 S.Ct. 269, 279 n.3 (1981) (Stevens, J., concurring); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).

ality--but instead signals an adjustment between protected rights and truly overriding governmental concerns.

Beyond its circularity, a balancing test or sliding scale is ultimately standardless. How are the degrees of interference or burden to be determined? Under a balancing test, how much additional cost[28/] must be imposed or how great must be the additional health risks before the burden of an abortion regulation outweighs, for example, a pre-viability state interest in protecting potential life? Or is "burdensomeness" measured by the number of abortions the regulation actually curtails? Under the sliding scale, how much additional cost, how great the

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28/ See note 22 supra.

health risks, or how many foregone abortions would be necessary before strict scrutiny would govern?

Instead of according more deference to state and local governments, such weaker standards of review--with their intrinsic indeterminacies--would only multiply the number of federal-state clashes, as federal courts at all levels struggled to implement that regime. The various lower courts would undoubtedly reach conflicting conclusions about the "burdensomeness" of all manner of regulations, thereby increasing the uncertainty in fundamental-rights cases generally and, in particular, compelling this Court's continuing role as the arbiter of the permissibility of every state's and every city's abortion laws.

III.

Because of the unique status of children under the law, this Court has used a special standard of review for regulations of abortions for minors, requiring states to allow mature minors to make their own abortion decisions and to free from parental involvement all those minors whose best interests so demand.

Children have occupied a unique status throughout this Court's constitutional adjudication. As a plurality of this Court observed in Bellotti v. Baird, 443 U.S. 622 (1979): "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Id. at 633-34 (plurality opinion)

(quoting May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). Hence, "constitutional principles [must] be applied with sensitivity and flexibility to the special needs of parents and children." Bellotti, 443 U.S. at 634 (plurality opinion).

Certainly, the Constitution protects minors as well as adults. See, e.g., In re Gault, 387 U.S. 1, 13 (1967). Moreover, as this Court has recognized, adolescent pregnancy is a widespread and personally devastating occurrence.[29/] Yet because of the

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29/ See Michael M. v. Superior Court, 450 U.S. 464, 470-71 (1981) (plurality opinion); id. at 479

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unique status of children under the law, this Court has applied a special standard of review in cases examining the privacy rights of minors: "whether there is any significant state interest [supporting the regulation] that is not present in the case of an adult." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976); Carey v. Population Services International, 431 U.S. 678, 693 (1977) (plurality opinion). As a plurality of this Court explained in Carey, 431 U.S. at 693 n.15:

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(Stewart, J., concurring); id. at 481-82 (Blackmun, J., concurring); Carey v. Population Servs. Internat'l, 431 U.S. 678, 696 & n.21 (1977) (plurality opinion).

> This test is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, Prince v. Massachusetts, 321 U.S. 158 (1944); Ginsberg v. New York, 390 U.S. 629 (1968), and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. See, e.g., Planned Parenthood, 428 U.S., at 102 (Stevens, J., concurring in part and dissenting in part).

This Court's repeated emphasis of the long held and deeply rooted doctrine according minors a unique status under the law, see Bellotti; Danforth, 428 U.S. at 74-75; Ginsberg v. New York, 390 U.S. 629, 638-41 (1968); Prince v. Massachusetts, 321 U.S. 158,

170 (1944), explicitly refutes any theory, such as that embraced by Judge Kennedy, writing separately in the Akron case, that all of this Court's privacy precedents -- those concerning minors as well as adults -- should be read together as the source of a universal, sliding-scale standard of review for abortion regulations, whether applicable to minors or adults. See Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1211-15 (6th Cir. 1981) (Kennedy, J., concurring and dissenting), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-746 & 81-1172). See also Akron Center for Reproductive Health v. City of Akron, 479 F. Supp. 1172, 1198-1200 (N.D. Ohio 1979). This

Court's precedents plainly recognize that minors' abortion rights pose problems distinct from those affecting adults and demand a distinct standard of review.

This Court has identified three concerns uniquely relevant to minors: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Bellotti, 443 U.S. at 634 (plurality opinion). Although these special concerns will not support a state-granted parental veto over a minor's abortion decision, Danforth, 428 U.S. at 74-75, a majority of the Justices of this Court would approve a more narrowly drafted statute allowing minors judicially determined to be mature to make their own

abortion decisions while requiring immature minors to obtain a consent-substitute, parental permission or judicial authorization predicated upon a determination of the minor's best interests. See Bellotti, 443 U.S. at 643-44 (plurality opinion for four Justices); id. at 656-57 (White, J., dissenting) (expressing approval of even absolute parental consent requirement).

Similarly, this Court has validated a parental notification requirement because it served not only "the important considerations of family integrity and protecting adolescents" but also "a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician." H.L. v. Matheson, 450 U.S. 398, 411 (1981). This Court did not, however, extend

that holding to mature or emancipated minors or to immature minors showing such notification detrimental to their best interests. 450 U.S. at 407 & n.14.

The abortion regulations at bar pertinent to minors must be tested against the special standard of review and in light of the special concerns for minors and their parents articulated by this Court in the past. Under these guidelines, the district court and the court of appeals correctly held unconstitutional Akron's requirement of parental or judicial consent for abortions for all minors under the age of fifteen. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1201 (N.D. Ohio 1979), aff'd in part, rev'd in part, 651 F.2d 1198, 1205 (6th Cir. 1981),

cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982) (Nos. 81-746 & 81-1172). This provision--enacted before this Court's decision in Bellotti--impermissibly allows parents or, alternatively, a court to veto the abortion choice of even a minor under the age of fifteen years who is sufficiently mature to reach that decision herself. See Bellotti, 443 U.S. at 643-44 (plurality opinion). Moreover, it contains no procedural safeguards that ensure an abortion for an immature minor under the age of fifteen years whose best interests require termination of her pregnancy without any parental involvement.30/ See id. at 651. See also

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30/ Where, as here, the class addressed consists of pregnant minors below the age of fifteen, the procedures

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H.L., 450 U.S. at 413-20 (Powell, J., concurring, joined by Stewart, J.) (some minors' best interests require exemption from parental notification); id. at 446, 452-53 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (same).

Without such exceptions and safeguards, this provision of the Akron ordinance fails as unconstitutionally overbroad.

CONCLUSION

For all of the reasons stated, the 85 amici respectfully submit that the prima facie privacy right recognized

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purportedly offering a meaningful alternative to parental involvement must be clearly described and easily understood. This provision of the Akron ordinance, referring only to "a court having jurisdiction," fails this test. See 479 F. Supp. at 1201.

in Roe v. Wade includes freedom to effectuate the abortion choice without government interference; that the strict judicial scrutiny used in Roe and its progeny must apply to all enactments at bar regulating abortion procedures for adult women; and that the special standard of review articulated by this Court in recognition of the unique status of children under the law must apply to the enactments at bar regulating abortion procedures for minors.

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